HAZEN PAPER COMPANY, ET AL.,

Petitioners,

v.

WALTER F. BIGGINS,

Respondent.

... TO THE

... THE FIRST CIRCUIT

Questions Presented.

1. Whether the Circuit Court correctly determined that the standard established by this Court in *Trans World Airlines, Inc.*, v. *Thurston*, 469 U.S. 111 (1985), for proving a willful violation of the Age Discrimination in Employment Act applies to a case of individual discriminatory treatment?

2. Whether the courts below correctly held that an individual's termination on the eve of his pension vesting may be considered as evidence of age discrimination?

List of Parties.

The parties to the proceedings below were the respondent Walter F. Biggins and the petitioners Hazen Paper Company, Robert Hazen and Thomas N. Hazen.

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No. 91-1600

IN THE
Supreme Court of the United States
October Term, 1992

HAZEN PAPER COMPANY, ET AL.,
Petitioners,

v.

WALTER F. BIGGINS,
Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS

Statement of the Case.

This case arose out of the termination of the respondent Walter Biggins from his employment at the petitioner Hazen Paper Company (hereinafter Hazen). At the time of his discharge, Mr. Biggins was sixty-two years old. He was terminated after being falsely accused of disloyalty to the company. There were numerous specific incidents of disparate treatment of Mr. Biggins in the circumstances leading up to his termination, including requesting him to sign a confidentiality and non-compete agreement that was not being required of the younger technical department employees, and proposing that he remain with the Company as a consultant and surrender his health, life, and other employee benefits enjoyed by the younger members of his department. On his refusal Mr. Big-

gins was fired on the eve of his pension vesting. He was replaced by a thirty-five year old who received all these benefits.

Prior Proceedings.

In February 1988, the respondent, Mr. Biggins, commenced this action in the District Court of Massachusetts. The complaint sought relief for violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, et. seq., Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140, and state law claims for fraud, breach of contract, wrongful discharge and violations of the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, § 11*I*. After a five-day trial, the jury returned verdicts in response to special questions in favor of Mr. Biggins under the ADEA (damages $560,775), ERISA (damages $100,000), breach of contract (damages $266,897), fraud (damages $315,000), Massachusetts Civil Rights Act (damages $1), and wrongful discharge ($1). (J.A. 193-197).[1] The jury found the violation of the ADEA to be willful. (J.A. 193).

The district court granted the defendant Hazen's motion for judgment notwithstanding the verdict on the Massachusetts Civil Rights claim and on the willfulness finding. (Cert. Pet. A-88). The district court disallowed the jury's finding of willfulness on grounds that a finding of willfulness required "direct" evidence and "proof to push the level of conduct to a higher plateau," citing *Neufeld* v. *Searle Laboratories*, 884 F.2d 335 (8th Cir. 1989). (Cert. Pet. A-62).

On cross appeals, the Court of Appeals for the First Circuit reinstated the jury verdict on the issue of willfulness, reversed

[1] References are as follows: Joint Appendix: J.A.; Hazen's Petition for Writ of Certiorari: Cert. Pet.; Appendix for First Circuit Court of Appeals: C.A. App.; Hazen Brief: Pet. Brf.

the award for breach of contract, reduced the amount of damages awarded under the ADEA and affirmed all other parts of the verdict. (Cert. Pet. A-48-49). The Circuit Court reinstated the jury's verdict on willfulness by adopting without change this Court's definition of willfulness as set forth in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), and rejecting the standard created by the district judge. (Cert. Pet. A-20). Motions for rehearing and hearing en banc were denied. (Cert. Pet. A-2).

Petitioners then sought certiorari on the question of whether *TWA* v. *Thurston* may be applied to claims of individual discriminatory treatment and whether an employer's interference with an employee's pension vesting violates the ADEA. On June 22, 1992, this Court granted the Petition for Writ of Certiorari.

The Facts.

Walter Biggins graduated from high school in his hometown of Worcester, Massachusetts, in 1943, and at age eighteen went into the Army.[2] (J.A. 45). He returned home in 1945 and with many others availed himself of the "G.I. Bill" to obtain a Bachelors and Masters Degree in Chemistry from the College of the Holy Cross, also in Worcester. (J.A. 45). Virtually all of his adult life was spent as a chemist and executive in the paper industry. (J.A. 46-47). In 1977 he was hired by Hazen as its technical director. (J.A. 47). The principals of Hazen had no technical background and hired Mr. Biggins because he was the most qualified applicant for the job. (C.A. App.

[2] At footnote 9 of their brief, the petitioners assert that they accept, in their statement of facts, the respondent's evidence as true. However, they admit they "supplement" that evidence with evidence from petitioners they claim to be " . . . neither impeached nor substantively contradicted at trial" (Pet. Brf. p.7 n.9). No authority is given by the petitioners for incorporating in their facts evidence which is unfavorable to the respondent which the jury was not required to credit.

855). Hazen is a paper converter that specializes in applying decorative coatings to paper used primarily for cosmetic wrap, lottery ticket stock, and pressure sensitive labels. (J.A. 48).

At the time Mr. Biggins was hired, the paper converting industry was mandated to find a method to neutralize the hazardous emissions resulting from the use of nitrocellulose and vinyl coatings or develop emission-free alternative coatings. (J.A. 52-53). Mr. Biggins embarked, on his own initiative, on a program to develop new coatings which would be acceptable to customers and comply with the changing environmental laws. (J.A. 54). Mr. Biggins, through a long and complex process, working primarily on his own time at home and continuing all his other duties at the plant, developed a water-based coating acceptable to the customers of Hazen Paper which complied with all new laws and regulations. (J.A. 56-59). The coating came to be called "Biggins' Acrylic" at Hazen. (J.A. 61). By 1983 Mr. Biggins, working with Mr. Robert Hutchinson, Hazen's manufacturer's representative, gained acceptance of the Biggins' Acrylic by the technical department of the dominant manufacturer in the pressure sensitive label industry. (J.A. 62-63).

The development by Mr. Biggins of his water-based coating was essential to the future success of Hazen and gave it a substantial advantage over its competitors. (C.A. App. 648). Thomas Hazen himself said of the Biggins Acrylic, " . . . the future growth of the company depends on it." (C.A. App. 1558). Mr. Hutchinson, Hazen's manufacturer's representative, testified that the development at Hazen of the water-based coating before any of its competitors gave Hazen an absolute advantage in the pressure sensitive market that allowed its market share to grow from 25 percent in the late seventies, to 65 percent at the time of trial. (C.A. App. 638-639).

Following the development of the Biggins' Acrylic, the sales of Hazen increased from $8,994,000 in 1977 to $28,815,000 in

1986 and $40,554,000 in 1989. (C.A. App. 1276, 1304; 1410). Biggins' Acrylic was an unusually profitable item for Hazen. (J.A. 68, C.A. App. 338-339; 852).

In 1983 and thereafter, Mr. Biggins had several conversations with Thomas Hazen concerning his compensation. (J.A. 71-73). As a result of these discussions, Mr. Biggins was promised stock in Hazen as a part of his compensation. (J.A. 72-73).[3] That stock was not forthcoming. After waiting well into 1985, Mr. Biggins became more outspoken in his demands for the promised stock. (J.A. 76-77). The Hazens put him off.[4] (J.A. 74-77).

On May 24, 1986, Thomas and Robert Hazen called Mr. Biggins into their offices at the company and accused him of being involved in the operation of outside businesses. (J.A. 78-79). Mr. Biggins was perplexed because both the businesses mentioned were established for the benefit of his son Timothy. (J.A. 84). Further, Mr. Biggins had previously told Thomas Hazen about both businesses, and that he was going to assist his son. (J.A. 80). Thomas Hazen had approved. (J.A. 80). Walter Biggins' son, Timothy, did all the work in both businesses. (J.A. 84; 123-127). One of the businesses had ceased all operations two years previously in 1984. (J.A. 79).

On June 3, 1986, as a follow up to the previous discussion, Thomas Hazen gave Mr. Biggins an agreement to sign. (J.A. 80-81). The agreement included a two-year covenant not to compete during which Mr. Biggins would be paid no severance at all and a clause conveying to Hazen Paper rights in anything Mr. Biggins had invented or developed. (J.A. 169-171). Mr.

The petitioners in their statement of facts say Thomas Hazen's testimony clarified Mr. Biggins' "ambiguous" testimony by claiming Mr. Hazen only talked of "considering" some "phantom stock options." (Haz. Brf. 10-12). They failed to note the jury specifically found that the stock promise was made. (J.A. 194).

[3] The jury awarded Mr. Biggins $315,000 for fraud by the Hazens in falsely promising the stock and not giving it to him. (J.A. 195). The judgment for fraud was affirmed by the district and circuit courts and is now final.

Biggins had the agreement reviewed by his family lawyer and offered to sign it, provided his compensation arrangement, including the promised stock, was incorporated. (J.A. 86-87). Thomas Hazen refused and instead suggested Mr. Biggins accept a consulting arrangement under which he would lose all his employee benefits but still be available to the company. (J.A. 87, 153, 160-161).

None of the other employees in the technical department at Hazen, all of whom were in their thirties, were presented with such agreements nor were they asked to become consultants and give up all their employee benefits. (J.A. 85).

On June 13, 1986, Mr. Biggins was within hours of his pension vesting.[5] (J.A. 88). Thomas Hazen called him into his office and told him to sign the agreement without any changes or be fired. (J.A. 88). Mr. Hazen then fired Mr. Biggins. (J.A. 88). Although the asserted reason for the firing was disloyalty, Thomas Hazen told Walter Biggins just days before the termination that he had been a "loyal" employee who always gave 100 percent to the company. (J.A. 86).

Previously Mr. Biggins had been told by the Hazens that his life insurance policy was costly because he was so old and that he was "too old" to take advantage of the company's membership in a health club. (J.A. 99).

It took Hazen almost a month to pay Mr. Biggins for the time he worked in June of 1986. (J.A. 90). Hazen denied Mr. Biggins any earned or accumulated vacation pay. (J.A. 90-91). Hazen paid Mr. Biggins no severance after his almost ten years of service. (J.A. 91). When Mr. Biggins applied for unemployment compensation, Thomas Hazen, in order to deny any benefits to him, instructed the company comptroller to falsely

[5] Because he was over age sixty, Mr. Biggins was able to immediately draw benefits from the pension plan if he chose. (J.A. 182).

inform the State Division of Employment Security under oath that Mr. Biggins had voluntarily quit. (See *infra* Add. to Brf. A-1.)*

Walter Biggins, in the summer after he was fired, joined his son Timothy in the remaining outside business that his son had been running. (C.A. App. 405). Mr. Biggins did this after learning there was a "limited" employment market for someone his age. (C.A. App. 405).

Mr. Biggins was replaced by Timothy McDonald, a thirty-five-year-old research chemist hired from a competitor. (C.A. App. 779). Mr. McDonald was given a written employment agreement which, unlike Mr. Biggins', did include his compensation arrangement with the Company, provided him with a severance pay package of 100 days, and granted him a favorable covenant not to compete of only 180 days. (J.A. 176-180). Mr. McDonald's agreement provided he would be paid during 55.5 percent of the time he was prohibited from working by his covenant not to compete. (J.A. 177). Mr. Biggins was to be paid nothing for the two years he could not work. (J.A. 169-171).

Despite petitioners' continued assertions that the discharge was the result of disloyalty, Mr. Biggins presented evidence directly rebutting these claims. The jury, charged under the standards of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), found the allegations of disloyalty to be unworthy of credence and a pretext for willful age discrimination.

* In the Joint Appendix, the Hazens' response to the state was incorrectly reproduced. As printed, it omitted the language which stated the response was filed under oath, and which showed the Hazens could have selected discharge instead of voluntary quit as the reason for separation. Both parties have agreed, with the permission of the Clerk, to reprint the complete exhibit in the Addendum to this brief.

Summary of Argument.

I. Under the ADEA, a victim of age discrimination may recover liquidated damages if the jury concludes that the violation of the statute was "willful." In affirming the jury's verdict that the violation was willful, the Circuit Court applied the standard of "willfulness" approved by this Court in *Trans World Airlines, Inc.* v. *Thurston, supra*, and *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128 (1988), which require a finding that the employer knowingly violated the ADEA, or that the employer acted with reckless disregard for whether its conduct violated the law. The Circuit Court's application of the *Thurston* definition of "willfulness" in a case of discrimination against an individual was proper because (1) the "knowing or reckless disregard" standard is consistent with plain meaning of the term, (2) nothing in the legislative history of the ADEA even remotely suggests that Congress intended the term "willfulness" to have a different meaning in cases of discrimination against an individual than in cases involving employment policies with a disparate impact on older workers, (3) Congress has employed the concept of willfulness to establish "two-tier" liability under a number of statutes, none of which has been judicially interpreted to require either "outrageous" conduct or "direct" evidence of discrimination in order to prove willfulness, and (4) liability for double damages will not follow automatically in every case of age discrimination against an individual because the discriminating employer may avoid a finding of willfulness by proving that the intentional conduct was motivated by a good faith, though erroneous, belief that the employer was not violating the ADEA.

II. This case is not one where the Circuit Court equated pension discrimination with age discrimination because the jury considered other evidence of age discrimination having nothing to do with respondent's pension status, including de-

rogatory comments about his age, compulsion to enter into a confidentiality agreement with oppressive terms not required of younger employees, and the fabrication of pretextual reasons for his firing and replacement by a younger person. The courts below relied on all of this evidence in upholding the jury's verdict. The question of whether an employer's improper interference with pension vesting can be used to support a finding of age discrimination was not preserved below because the petitioners neither objected to the introduction of this evidence on the ADEA claim, nor requested a jury instruction that such evidence was not to be considered by the jury on the ADEA claim. In any event, evidence that an employer discharged an individual in order to interfere with his pension vesting is admissible under the ADEA as evidence of age discrimination. The evidence was particularly appropriate here, where the respondent was discriminated against on the basis of all his employee benefits when he was sixty-two years of age and would otherwise have been eligible to draw pension benefits because of his age, and when considered with all the other evidence of discriminatory conduct.

Argument.

I. The First Circuit Correctly Applied *TWA* v. *Thurston* to This Case of Age Discrimination Against an Individual.

The First Circuit's decision is consistent with this Court's decision in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), and petitioners present no sound reason why that holding should either now be reversed or not applied to the circumstances of this case. The *Thurston* standard comports with the plain meaning of the statute. It provides a uniform

definition of the term "willful" under the ADEA that is consistent with the meaning of "willfulness" under other federal statutes and is supported by Congressional intent and legislative history. In contrast, the standard proposed by the petitioners is a standard adhered to only in part by a single circuit. It does not logically follow from any accepted definition of the term "willful" and would effectively rewrite the statute.

The relevant provision of the ADEA provides: "liquidated damages shall be payable only in cases of willful violations of this chapter." 29 U.S.C. § 626 (b).

This Court has previously determined that under 29 U.S.C. § 623(b) the term "willful" means whether the defendant "knew or showed reckless disregard" for whether its conduct violated the ADEA. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. at 126. In the present case, the First Circuit adhered to this standard in affirming the jury's finding of willfulness.

In *Thurston* this Court unanimously held that this definition of "willful" was consistent with the legislative history and "consistent with the manner in which this Court has interpreted the term in other criminal and civil statutes." *Id.* at 126. The Court rejected evil motive, bad purpose or a specific intent to violate the Act as necessary to recover liquidated damages, and made clear that the employer could avoid liquidated damages by showing it acted reasonably and in good faith in attempting to determine if it was violating the Act. *Id.* at 129.

At the time of trial, the jury was charged according to the *Thurston* standard, but the court told the jury that it must also find that the ". . . Defendants, with bad purpose, intentionally disobeyed or ignored the law." (J.A. 166)[7].

[7] The Circuit Court's opinion correctly noted of the instruction: "This instruction went further than necessary because the bad purpose requirement established by this Circuit in *Loeb* [v. *Textron, Inc.*, 600 F.2d 1003, 1020 n.27,] was eliminated by *Thurston*, 469 U.S. at 126 n.19. The instruction misstated the applicable law, and thereby prejudiced the plaintiff because it held him to a higher standard of proof than is required by *Thurston* and this circuit." Haz. Pet. A-21.

The petitioners did not object to this instruction, or offer any alternative instruction. The jury returned a finding of willfulness. (J.A. 193) The petitioners then filed a motion for judgment notwithstanding the verdict and the district court granted the motion, holding:

> Upon consideration of *Neufeld* and similar authorities, the court now holds that plaintiff, in order to recover liquidated damages, must prove that the employer engaged in specific age-based conduct that rises above an ordinary ADEA violation. Inferential evidence of discrimination is not enough to establish willfulness. Mere proof of an ADEA violation, without more, does not adequately distinguish between ordinary and willful violations of the ADEA. There must be proof sufficient to push the level of conduct to a higher plateau.

(Cert. Pet. A-59-60).

The First Circuit Court of Appeals reversed, stating:

> We, therefore, adopt, without modification or qualification, the *Thurston* test for willfulness: "a violation is 'willful' if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" *Thurston*, 469 U.S. at 128 (citation omitted).

(Cert. Pet. A-20).

A. *Plain Meaning Supports Application of the Thurston Standard for Determining Willfulness in Individual Age Discrimination Cases.*

The starting point of any inquiry into the meaning of a statute is the language of the statute itself. *U.S. Dept. of Transp.* v. *Paralyzed Veterans of America*, 477 U.S. 597, 604 (1986); *United States* v. *James*, 478 U.S. 597, 604 (1986); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756, *reh'g denied*, 423 U.S. 884 (1975). Legislative purpose is expressed by the ordinary meaning of the words used. *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982); *United States* v. *James*, 478 U.S. at 604. It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute. *Perrin* v. *United States*, 444 U.S. 37, 42 (1979).

The definition of the term "willfulness" adopted by this Court in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. at 126, and *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. at 133, complies fully with these standards. In *McLaughlin* the Court stated:

> In common usage the word "willful" is considered synonymous with such words as "voluntary," "deliberate" and "intentional." See Roget's International Thesaurus § 622.7 p 479, § 653.9 p 501 (4th ed. 1977). The word "willful" is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The standard of willfulness that was adopted in *Thurston* — that the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute — is surely a fair reading of the plain language of the Act.

McLaughlin v. *Richland Shoe Co.*, 486 U.S. at 133.

Certainly nothing about the term "willful" itself, or its statutory context here, implies in any way an intent to create a different meaning for "willful," depending on the type of evidence presented, whether the plaintiff is an individual or a group, or whether the actions taken are somehow more "outrageous" or "egregious" than any other willful violation of the law.

In the face of these clear principles, petitioners propose an interpretation of "willfulness" completely divorced from any known or accepted meaning of the term "willful," and indeed not related to the meaning of the term at all. The proposal advanced by the petitioners substitutes an interpretation of the statutory language with a test based on the nature of the evidence introduced to prove the violation: a basis for statutory interpretation that is not logical, finds no support in any established theory of statutory construction, and in fact, could not be called statutory construction at all. It attempts not to define "willfulness" but, as they admit, puts "a gloss" on the term, presumably for the purpose of achieving their desired result. (Pet. Brf. 44). In no other statutory context has the term "willfulness" been interpreted in the manner proposed by petitioners.

Petitioners assert a need for a different standard for individual discriminatory treatment cases. (Pet. Brf. 35). Nowhere does the statute distinguish between "willfulness" in cases of "disparate impact," "systematic discrimination," or individual "disparate treatment" cases. Nor does the statute even remotely suggest that the term "willfulness" should have different meanings, depending upon the theory of the plaintiff's case. Respon-

dent is unaware of, and petitioners do not cite, any other statute where a single term is given different meanings on the basis of what type of plaintiff pursues the case and/or what type of evidence he presents. In fact, the statute is itself clear and unambiguous, and does not call for these elaborate and contorted attempts to judicially rewrite it.

B. *Legislative History Supports Application of the Thurston Standard for Determining Willfulness in Individual Age Discrimination Cases.*

The plain meaning of a statute is conclusive absent strong evidence clearly expressed that Congress intended a different meaning. *United States* v. *James*, 478 U.S. at 606; *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). There is no such evidence here.

This Court has already determined that the standard of *Trans World Airlines, Inc.* v. *Thurston* is consistent with the legislative history of the ADEA. 469 U.S. at 125-126. The "willful" provision of the Act was proposed as a substitute for a criminal provision. *Ibid.* No reference was made to distinguishing between "disparate impact" or "disparate treatment" cases. Nothing in the legislative history remotely suggests a desire for the term "willful" to have different meanings depending upon the nature of the plaintiff's evidence. *Ibid.* What the legislative history does show is a strong connection between the ADEA and the Fair Labor Standards Act. See 29 USC § 216(b) (Act to be enforced in accordance with the FLSA)[8]. In *Trans World Airlines, Inc.* v. *Thurston*, the Court stated:

[8] The House Committee report emphasized that the investigation and enforcement of the bill would be in accordance with the Fair Labor Standards Act. H.R. Rep. No. 805, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. Code Cong. & Ad. News 2213, 2222-2223 (1967).

> This Court has recognized that in enacting the ADEA, "Congress exhibited . . . a detailed knowledge of the FLSA provisions and their judicial interpretation. . .". *Lorillard[, Div. of Loew's Theatres, Inc.]* v. *Pons*, [434 U.S. 575, 581 (1978)]. The manner in which the FLSA has been interpreted, therefore, is relevant. . . . Given the legislative history of the liquidated damages provision, we think the "reckless disregard standard is reasonable."

469 U.S. at 126.

This Court has also determined that under the FLSA:

> The standard for "willfulness" that was adopted in Thurston — that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute — is surely a fair reading of the plain language of the Act.

McLaughlin v. *Richland Shoe Co.*, 486 U.S. at 133.

There is, therefore, no basis within any legislative history for creating a wholly different standard for cases of individual disparate treatment. Nor is there any justification for adding to or subtracting from that term on the basis of some perceived desired result. See *C.I.R.* v. *Asphalt Products Co., Inc.*, 482 U.S. 117, 121 (1987).

The argument that Congress desired, in creating a two-tiered scheme, some particular percentage of cases to fall into one category or the other, is pure speculation and wholly unsupported by any legislative history. The only reference points Congress had were the FLSA and the Equal Pay Act, where liquidated damages were mandated for every violation. 29

U.S.C. § 216. In any event, the *Thurston* standard was adopted because it *avoids* automatic double damages, a result that can obtain in the case of an individual, just as with a group. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. at 128.

Petitioners contend that the standard of the First Circuit "guarantees the imposition of liquidated damages in every discriminatory treatment case." (Pet. Brf. p. 40). This will hardly be so. Employers who intentionally discriminate on the basis of age will normally also know their conduct is illegal. However, the employer can always present evidence that he did not know his conduct was illegal, as well as the defense of good faith, where in fact he had reason to believe he was not governed by the act or that the actions involved were not covered. There are numerous defenses that would fit this category: the employer could have a legitimate belief that he is not large enough to be covered by the act, 29 U.S.C. § 630(b); he may have had a false belief that a particular employee was not within the act's protected group, 29 U.S.C. § 631; he may have legitimate reason to believe there is a bona fide occupational qualification or bona fide seniority plan requirement, 29 U.S.C. § 623(f); or that the employee is subject to the executive exemption under 29 U.S.C. § 631 (c)(1).

Where no legitimate good faith defense exists (and none was offered here) the violating employer is not the victim of some obscure legal rule, but someone who has knowingly and deliberately violated a federal law. There is absolutely no reason to believe that Congress did not fully intend to provide these limited additional damages against those who willingly flaunt the law.

C. *Petitioners Advocate a Heightened Standard of Willfulness for Individual Age Discrimination Cases Which is Inconsistent With Judicial Interpretations of Willfulness Under Other Acts of Congress.*

Petitioners urge the Court not to apply its definition of "willfulness" announced in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, simply because this case involves discrimination against an individual, while *Thurston* involved an employment policy of general application.

A "two-tiered" structure of liability is not unique to the ADEA. Congress has frequently required a finding of willfulness as a predicate to imposing higher liability under a number of civil and criminal statutes. This Court and the vast majority of lower courts have not adopted a higher standard of substantive conduct (such as "outrageousness" or "egregiousness"), in defining "willfulness." Neither has this Court erected special evidentiary barriers which dictate that a particular *quantum*, or *type*, of evidence be adduced to support a finding of willfulness. "As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence." *U.S. Postal Service Bd.* v. *Aikens*, 460 U.S. 711, 714 n.3 (1983). Circumstantial evidence may be as probative as testimonial evidence. *Holland* v. *United States*, 348 U.S. 121, 140 (1954).

Congress first created a two-tiered liability structure for civil rights violations in the post-Civil War era when it enacted civil and criminal penalties for public officials who, acting under color of law, deprived individuals of constitutional rights. The principal difference between a civil violation under 42 U.S.C. § 1983 and a criminal violation under 18 U.S.C. § 242 is the element of willfulness. Nearly fifty years ago, this Court expressly rejected the notion that a willful violation of another's civil rights can only be proved with direct evidence. In *Screws* v. *United States*, 325 U.S. 91 (1945), this Court held that a

Court held that a conviction for willfully depriving another of constitutional rights would stand if the defendant acted in "reckless disregard of constitutional prohibitions or guaranties." *Id.* at 106. The evidence of willfulness could be entirely circumstantial:

> And such purpose [to deprive one of constitutional rights] need not be expressed; it may at times be reasonably inferred from all the circumstances attendant upon the Act. See *Tot* v. *United States*, 319 U.S. 463 (1943).

Screws, 325 U.S. at 106.

The very discussion by the Court in *Screws* of the evidence by which willfulness was provable in that case reveals the fallacy in the petitioners' argument, that a finding of individual discrimination necessarily entails a finding of willfulness. The defendants in *Screws* were indicted for willful violations of civil rights when they arrested an individual who was charged with theft, handcuffed him, beat him with their fists and with blackjacks, and dragged him into jail where he died an hour later. *Screws*, 325 U.S. at 92-93. The outrageousness or egregious nature of such conduct is nevertheless irrelevant to the question of whether the actor who commits the intentional acts "knows or acts in reckless disregard of its prohibition of the deprivation of a defined constitutional or other federal right." *Screws*, 325 U.S. at 104.

Under the Internal Revenue Code, Congress has established a "two-tiered" structure of liability for nonpayment of income taxes, reserving criminal penalties for those who "willfully" evade taxes. The Code provides for less severe civil penalties in the event of a good faith mistake. See 26 U.S.C. §§ 6651, 6653. This Court and lower courts, in the long history of

interpreting the provisions of the Internal Revenue Code, have never felt it necessary to create by judicial decision a higher standard of willfulness, or a more difficult evidentiary burden of proof, in order to delineate the difference between willful and nonwillful conduct. Most recently in *Cheek* v. *United States*, 111 S.Ct. 604 (1991), where a taxpayer was charged with willfully failing to file a federal tax return in violation of § 7203 of the Internal Revenue Code, this Court held that a good faith misunderstanding of the law or a good faith belief that one is not violating a law may be considered by a jury to negate a finding of willfulness, whether or not the claimed belief or misunderstanding is objectively reasonable. *Id.* at 610. As in *Thurston*, 469 U.S. 111, and in *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 108, the Court in *Cheek* applied a definition of willfulness which was broad enough to encompass a good faith but objectively unreasonable understanding of the law. So long as there was admissible evidence of a "voluntary, intentional violation of known legal duty," *Cheek*, 111 S.Ct. at 610, the question of willfulness under the Internal Revenue Code was one for the jury, rather than a legal one for the Court.[9]

If the defense to a charge of willful conduct is an asserted good faith belief that the act did not apply to the alleged conduct, the accused delinquent taxpayer finds himself in the same legal position as the employer sued under the ADEA — a finding of willfulness is avoided if "the jury believed him". *Cheek*, 111 S. Ct. at 611. This Court has not required proof of "outrageous" or "egregious" conduct in order to sustain a finding of willfulness under the Internal Revenue Code. See

[9] "Of course, in deciding whether to credit Cheek's good faith belief claim, the jury would be free to consider *any admissible evidence from any source*." *Cheek*, 111 S. Ct. at 611 [emphasis added].

"Knowledge and belief are characteristically *questions for the fact finder, in this case the jury*. Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it." *Id.*

United States v. *Murdock*, 290 U.S. 389 (1933) (conduct was willful within the meaning of the Revenue Acts of 1926 and 1928 if it was "marked by careless disregard [for] whether or not one has the right so to act." *Id.* at 395.).

This Court has recognized that where Congress has not limited the methods by which defendant can be liable for willful conduct, the Court should not "by definition constrict the scope of the Congressional provision that may be accomplished 'in any manner.'" *Ingram* v. *United States*, 360 U.S. 672, 676, (1959), quoting *Spies* v. *United States*, 317 U.S. 492, 499 (1943).[10]

There is no indication that Congress intended that a victim of age discrimination bear a heavier burden of proof on willfulness than that which courts have traditionally determined exists under numerous other federal statutes. When Congress enacted the willfulness provisions of the ADEA, presumably it was aware of prior judicial interpretations of the word.[11]

[10] Willfulness under the Tax Code has always been provable from circumstantial evidence. *See Spies* v. *United States*, 317 U.S. 492, 499 (1943) (willful attempt to defeat or evade income taxes may be "inferred" from improper bookkeeping practices "and any conduct, the likely effect of which would be to mislead or to conceal").

[11] *See Lorillard, Div. of Loew's Theatres, Inc.* v. *Pons*, 434 U.S. 575 (1978); *United States* v. *Illinois Cent. R. Co.*, 303 U.S. 239 (1938) (failure to unload a cattle car was deemed "willful" under the Cruelty to Animals Act if the defendant showed a disregard for the governing statute and was indifferent to its requirements); *United States* v. *Murdock*, 290 U.S. 389, 394 (1933) (under Internal Revenue Code, the question of the defendant's asserted good faith is a matter for the jury which may find willfulness if defendant's conduct shows "careless disregard" of the statute's requirements); *F. X. Messina Constr. Corp.* v. *Occupational Safety & Health Review Comm'n*, 505 F.2d 701, 702 (1st Cir. 1974) (under Occupational Safety & Health Act, "indifference to the requirements of law may alone represent a willful statutory violation") [emphasis added]; *Primo* v. *Simon*, 606 F.2d 449, 451 (4th Cir. 1979) (Gun Control Act of 1968 does not require a showing of malicious intent in order to support a finding of willful violation); *Roy* v. *United States*, 416 F.2d 874 (9th Cir. 1969) (threatening the life of the President: whether a threat was knowing and willfully made "is to be considered by the trier of fact in light of all the circumstances"); *RCA/Ariola Int'l, Inc.* v. *Thomas & Grayston Co.*, 845 F.2d 773 (8th Cir. 1988) (reckless disregard for the copyright holder's rights, rather than actual knowledge of infringement, suffices to warrant award of enhanced damages); *Amstar Corp.* v. *Envirotech Corp.*, 823 F.2d 1538, 1547 (Fed. Cir. 1987) (under Copyright Act, a finding of willful infringement depends upon the "totality of the circumstances"; finding of nonwillfulness supported by evidence of good faith); *United States* v. *Moylan*, 417 F.2d 1002, 1004 (4th Cir.), *cert. denied*, 397 U.S. 910 (1970) (under Selective Service Act, defendant charged with "willfully" or "knowingly" destroying government records was not entitled to an instruction requiring a finding of bad purpose or motive); *Wasson* v. *SEC*, 558 F.2d 879, 887 (8th Cir. 1977) (upholding conviction for willfully and knowingly selling unregistered securities under Securities Exchange Act of 1934, where defendant proceeded with the sale with "reckless indifference" to facts "suggesting the suspicious nature of the transaction"; defendant ignored the "obvious need for further inquiry"); *Hochstein* v. *United States*, 900 F.2d 543, 548 (2nd Cir. 1990), *cert. denied*, 119 S.Ct. 2967 (1992) (upholding finding of willful failure to pay withholding taxes; individual's bad purpose or real motive in failing to collect and pay taxes properly play no part in the civil definition of willfulness); *United States* v. *Hogan*, 861 F.2d 312, 316 (1st Cir. 1988) (jury entitled to consider defendant's negative attitude toward the IRS as an indication of willfulness; evidence of a personal philosophy and activity as a tax protester relevant to the question of willfulness); *Alabama Power Co.* v. *Federal Energy Regulatory Comm'n*, 584 F.2d 750, 753 (5th Cir. 1978) (willfulness under the Federal Power Act may be supported by evidence of "plain indifference" to requirements of the Act).

If Congress had intended the willfulness provisions of the ADEA to be applied more narrowly than courts have applied similarly worded statutes, it had "ways of doing so." *Screws* v. *United States*, 325 U.S. at 105. A finding of willfulness under each of these statutes enacted by Congress results in the imposition of a definitively greater legal sanction, yet nowhere has Congress either restricted the means of proof by a certain type of evidence, or dictated the quantum of the evidence necessary to support the predicate finding.

D. *A Majority of the Circuit Courts Adhere to the Thurston Standard in Cases of Individual Discriminatory Treatment.*

1. Adherence to the *Thurston* Standard is the Predominant Rule.

The First, Second, Fifth, Seventh, Ninth and Eleventh Circuits stand firmly for adherence to the principle that the *Thurston* definition of willfulness applies equally in the case of an individual and needs no gloss. *Benjamin* v. *United Merchants & Mfrs., Inc.*, 873 F.2d 41, 41-45 (2nd Cir. 1989); *Dominic* v. *Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1256 (2nd Cir. 1987); *Reichman* v. *Bonsignore, Brignati & Mazzota, P.C.*, 818 F.2d 278, 281 (2nd Cir. 1987); *Smith* v. *Great Am. Restaurants, Inc.*, 59 Fair Empl. Prac. Cas. (BNA) 646 (7th Cir. July 24, 1992) Nos. 91-1793 & 91-1864, 1992 WL 173234; *Brown* v. *M & M/Mars*, 883 F.2d 505, 512-514 (7th Cir. 1989); *Holzman* v. *Jaymar-Ruby, Inc.*, 916 F.2d 1298, 1304-1305 (7th Cir. 1990); *U.S. EEOC* v. *Century Broadcasting Corp.*, 957 F.2d 1446, 1458 (7th Cir. 1992); *Overgard* v. *Cambridge Book Co.*, 858 F.2d 371 (7th Cir. 1988); *Gilchrist* v. *Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1495-1496 (9th Cir. 1986); *Cassino* v. *Reichhold Chemicals Inc.*, 817 F.2d 1338, 1348 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988); *Lindsey* v. *American Cast Iron Pipe Co.*, 810 F.2d 1094, 1099-1101 (11th Cir. 1987); *Ramsey* v. *Chrysler First, Inc.*, 861 F.2d 1541, 1544 (11th Cir. 1988); *Verbraeken* v. *Westinghouse Elec. Corp.*, 881 F.2d 1041, 1048 (11th Cir. 1989), *cert. dismissed by Westinghouse Elec. Corp.* v. *Verbraeken*, 493 U.S. 1064 (1990). *Formby* v. *Farmers & Merchants Bank*, 904 F.2d 627, 631-632 (11th Cir. 1990).[12]

[12] Even before this court's decision in *Thurston*, several circuit courts had addressed the issue of willfulness under the ADEA and how it should be defined in cases involving individual disparate treatment, and no court had adopted any test similar to that proposed by the petitioners here.

The petitioners assert that the Seventh Circuit departs from the *Thurston* standard, but the cited cases fail to support this. *Aungst* v. *Westinghouse Elec. Corp.*, 937 F.2d 1216, 1224 (7th Cir. 1991), only requires that the plaintiff provide evidence beyond what is needed for an ordinary claim for age discrimination — but that is exactly what *Thurston* requires, that is, evidence of knowing or reckless disregard, which is not necessary to prove the underlying claim. The other, above-cited Seventh Circuit decisions all follow *Thurston* without a heightened standard. *Smith* v. *Great Am. Restaurants, Inc.*, 59 Fair Empl. Prac. Cas. (BNA) 646 (7th Cir. July 24, 1992) Nos. 91-1793 & 91-1864, 1992 WL 173234; *Brown* v. *M & M/Mars*, 883 F.2d 505 (7th Cir. 1989); *Holzman* v. *Jaymar-Ruby, Inc.*, 916 F.2d 1298 (7th Cir. 1990); *U.S. EEOC* v. *Century Broadcasting Corp.*, 957 F.2d 1446 (7th Cir. 1992); *Overgard* v. *Cambridge Book Co.*, 858 F.2d 371 (7th Cir. 1988). And see *Burlew* v. *Eaton Corp.*, 869 F.2d 1063 (7th Cir. 1989).

Petitioners argue that the Fifth Circuit follows a similar test to that of the Third by requiring "egregious" conduct citing *Hansard* v. *Pepsi-Cola Metro. Bottling Co., Inc., 865 F.2d 1461 (5th Cir. 1989), cert. denied*, 493 U.S. 842 (1989). This analysis of the Fifth Circuit does not bear scrutiny. In *Hansard*

The First Circuit previously held that willfulness meant not just voluntary and intentional, but required specific intent "to do something the law forbids with bad purpose to disobey or disregard the law." *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979).

Thurston itself arose out of the standard of the Second Circuit. *Air Line Pilots Ass'n, Int'l* v. *Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2nd Cir. 1983). See *Goodman* v. *Heublein, Inc.*, 645 F.2d 127, 131 (2nd Cir. 1981). The Third Circuit (whose present standard the petitioners now propose) also adhered to a *Thurston* test. *Wehr* v. *Burroughs Corp.*, 619 F.2d 276, 281-283 (3rd Cir. 1980) (any conduct that is intentional, knowing or reckless should be considered willful). The Fourth Circuit adhered to an even less stringent standard, that an employer acts willfully if he knew or had reason to know that his conduct was governed by the act. *Spagnuolo* v. *Whirlpool Corp.*, 641 F.2d 1109, 1114 (4th Cir. 1981), *cert. denied*, 454 U.S. 860 (1981).

the court held, after citing *Thurston*, and the Circuit's prior decision in *Powell* v. *Rockwell Int'l Corp*, 788 F.2d 279 (5th Cir. 1986), that:

> The evidence in this case was weak. There is simply no evidence that Pepsi's actions were so egregious as to justify finding a willful violation. *Hansard* v. *Pepsi Cola Metro. Bottling Co., Inc.*, 865 F.2d at 1470.

The court did not indicate that it was departing from *Thurston* in any way (though it may well have misinterpreted it) or that "egregious" was to be a new standard for individual cases, over and above the *Thurston* standard. The *Powell* v. *Rockwell Int'l. Corp.*, 788 F.2d 279, citation was to an earlier Fifth Circuit decision, which had simply applied an unadorned, unglossed *Thurston* standard to an individual case. *Powell* v. *Rockwell Int'l Corp.*, 788 F.2d at 285-286. This same *Thurston* standard had previously been followed in another 1986 case. *Galvan* v. *Bexar County, TX.*, 785 F.2d 1298, 1307, *reh'g denied*, 790 F.2d 890 (5th Cir. 1986).

Two 1989 Fifth Circuit decisions demonstrate that *Galvan* and *Powell* are still followed, since each adheres to the basic unadorned *Thurston* formula. *Uffelman* v. *Lone Star Steel Co.*, 863 F.2d 404, 410 (5th Cir. 1989); *cert. denied*, 490 U.S. 1098 (1989); *Burns* v. *Texas City Refining, Inc.*, 890 F.2d 747, 751 (5th Cir. 1989). The *Uffelman* court specifically rejected both the Tenth Circuit *Cooper* standard and, most significantly, the Third Circuit's *Dreyer* standard, stating, "[W]e believe it exceeds the *Thurston* standard." *Uffelman* v. *Lone Star Steel Co.*, 863 F.2d at 410 n.5.[13]

[13] As noted below, both the *Burns* and *Uffelman* courts found not only age discrimination violations, but also willful violations where the employees were terminated just prior (nine months in *Uffelman*) to the employees' pension vesting, which *Uffelman* also stated would even meet a standard of "outrageousness." *Uffelman* v. *Lone Star Steel Co.* at 410 n.5. *Burns* v. *Texas City Refining, Inc.* 89 F.2d at 751-752 (here, as was Mr. Biggins, the employees were accused of "moonlighting," a charge the jury refused to believe and found pretextual).

2. The Heightened Standards for Determining Willfulness Utilized by Some Circuits Are Illogical and Not Workable.

Some circuit courts have departed from the *Thurston* standard, but in doing so they have failed consistently to adhere to an alternative standard that is workable, or that permits an objective review based on a clear legal standard. They present a standardless, unpredictable, case by case approach, the results of which cannot be squared with the statute, *Thurston* or logic.

In 1986 in *Dreyer* v. *Arco Chemical Co., Div. of Atlantic Richfield Co.*, 801 F.2d 651 (3rd. Cir. 1986), *cert. denied*, 480 U.S. 906 (1987), the Third Circuit decided, despite *Thurston* and despite its prior decision in *Wehr* v. *Burroughs Corp.*, 619 F.2d 276, that in cases of individual disparate treatment on the basis of age, the statutory meaning of "willful" should be different, although the statute created no such distinction. The *Dreyer* court held that because the *Thurston* court stated that liquidated damages are punitive in nature, it should look to the RESTATEMENT OF TORTS standard for punitive damages as a guide, even though, the *Dreyer* court [illegible]des, *Thurston* implicitly rejected such an approach. *Dre*[illegible]301 F.2d at 657.[14] From this, the Circuit concludes that in cases of disparate treatment in a "discrete" employment situation,[15] "there must be some additional evidence of outrageous conduct," and that "the appropriateness of the award will be depen-

[14] The court does not attempt to explain why reference to the RESTATEMENT OF TORTS would not have been equally appropriate in *Thurston* itself from which the court presumes to devise its rationale.

[15] The Third Circuit distinguished between cases involving the adoption of a policy, and those of an action directed at an individual. Presumably, however, "policies" sooner or later are directed at individuals. If a general policy were adopted for the purpose of discrimination against an individual (or a group of individuals), into which category would it fall?

dent upon an ad hoc inquiry into the particular circumstances." *Dreyer*, 801 F.2d at 658.[16]

Since *Dreyer*, the Third Circuit has indeed been forced to wade into "ad hoc inquiry into the particular circumstances," having had to decide thus far decide at least six additional cases, posing the question of what constitutes "outrageous" conduct meriting liquidated damages. *Turner* v. *Schering-Plough Corp.*, 901 F.2d 335, 346-347 (3rd Cir. 1990) (proportionate loss of pension benefits not "outrageous"); *Lockhart* v. *Westinghouse Credit Corp.*, 879 F.2d 43, 57-58 (3rd Cir. 1989) (requires harm beyond that normally associated with an employee's discharge and notes that it would be outrageous to ask an older employee to train his younger replacement); *Kelly* v. *Matlack, Inc.*, 903 F.2d 978, 981-982 (3rd Cir. 1990) (pretext and forcing the plaintiff to file suit to obtain remedy not "outrageous"); *Bartek* v. *Urban Redevelopment Auth. of Pittsburgh*, 882 F.2d 739, 744-746 (3rd Cir. 1989) (evidence that met *Thurston* standard not proof of outrageousness); *Anastasio* v. *Schering Corp.*, 838 F.2d 701, 706-707 (3rd Cir. 1988); *Bruno* v. *W.B. Saunders Co.*, 882 F.2d 760, 771-772 (3rd Cir. 1989) (conditioning offer of another job on release of EEOC charge was "outrageous").

These cases show that this standard for "willfulness" is in fact unrelated to age discrimination in itself and dependent only upon how harshly the court feels the employer behaved. The oddest result comes in the *Bartek* case, where the Court held:

> [A]lmost all of the evidence that Bartek contends is demonstrative of outrageous conduct actually pertains to the "knew or showed reckless disregard" standard of Thurston and thus is *not germane to this case*. (*Bartek* v. *Urban Redevelopment Auth. of Pittsburgh*, 852 F.2d at 745 (emphasis supplied).

[16] The petitioners fail to point out that *Dreyer* further states that "termination of an employee at a time that would deprive him or her of an imminent pension might show the outrageousness of conduct that would warrant double damages." *Dreyer*, 801 F.2d at 658. This of course is exactly what occurred in this case. Consequently, the primary authority on which the petitioner relies specifically adheres to a standard which requires a finding in favor of Mr. Biggins and accepts loss of a pension benefit as evidence of age discrimination.

In other words, the standard the Third Circuit uses allegedly to adhere to *Thurston's* principles renders *Thurston* irrelevant.

Given the confused and bizarre nature of these results, it is not surprising that one Third Circuit judge has stated, with respect to this willfulness standard, that it is "much easier to state than to apply to the variety of factual settings coming before the court." *Kelly* v. *Matlack, Inc.*, 903 F.2d at 987 (Seitz, J., dissenting).[17]

Three other circuits have departed from the *Thurston* formulation for willfulness in cases involving individuals, the Sixth, Tenth and Eighth Circuits. Their attempts differ significantly from the Third Circuit's approach but have proven to be equally unworkable.

The Sixth Circuit has held that a defendant's conduct was willful only if age was the "predominant factor" in the decision to terminate the plaintiff. *Schrand* v. *Federal Pac. Elec. Co.*, 851 F.2d 152, 158 (6th Cir. 1988); *Wheeler* v. *McKinley Enterprises*, 937 F.2d 1158, 1164 (6th Cir. 1991).

The Tenth Circuit has sometimes followed this standard as well. *Cooper* v. *Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988); *Anderson* v. *Phillips Petroleum Co.*, 861 F.2d 631, 636 (10th Cir. 1988); *Krause* v. *Dresser Industries, Inc.*, 910 F.2d 674, 678 (10th Cir. 1990). The Tenth Circuit has, however, not been able to adhere consistently to this standard and, more frequently than not, ignores it.[18] In

[17] In other contexts, this Court has recognized that the use of "outrageous" as a standard is dubious, as it is inherently subjective and dependent upon a juror's taste and views. See *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 56 (1988).

[18] Prior to *Cooper* the Tenth Circuit had adhered to the *Thurston* standard; *Furr* v. *AT & T Technologies, Inc.*, 824 F.2d 1537, 1546, 1547 (10th Cir. 1987); *EEOC* v. *Wyoming Retirement System*, 771 F.2d 1425, 1431 (10th Cir. 1985); *Smith* v. *Consolidated Mut. Water Co.*, 787 F.2d 1441, 1443 (10th Cir. 1986).

Anderson the court held that the evidence was just "too thin and circumstantial" to satisfy *Cooper*, without stating that age was not the predominant factor. *Anderson* v. *Phillips Petroleum Co.*, 861 F.2d at 636.[19] In *Spulak* v. *K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990), the court found that the employer's conduct satisfied the "something more" requirement set out in *Thurston*, *Cooper* and *Anderson* and treated *Cooper's* test and *Thurston's* as one and the same. *Spulak* v. *K Mart Corp.*, 894 F.2d at 1159. Again in *Krause* v. *Dresser Industries, Inc.*, 910 F.2d 674 (10th Cir. 1990), the court said the predominant factor test was not met because the evidence was too thin and "something more" was required. *Krause* v. *Dresser Industries, Inc.*, 910 F.2d at 678. Clearly this standard presents the same problems as the Third Circuit's: the cases are in fact being decided on an ad hoc basis, rather than by any real governing standard.

Petitioners do not propose the "predominant factor" test of the Sixth and Tenth Circuits, but claim it "echoes" the Third Circuit's "outrageousness" test.[20] There is, in fact, no connection. A "predominant factor" question goes solely to the question of the evidence of age motive itself, whereas "outrageousness" may be dependent upon extraneous matters which might have nothing to do with the underlying violation itself.

Other Courts have had difficulty when they have sought to depart from the *Thurston* standard.

The Fourth Circuit offers still another "heightened" standard of unknown proportions. The court apparently admits that it

[19] *Anderson* also specifically rejected the outrageous conduct standard of the Third Circuit. *Anderson* v. *Phillips Petroleum Co.*, 861 F.2d at 636.

[20] In fact, petitioners attempt their own "interpretive gloss" by proposing the additional standards of "repeated" "without colorable justification or otherwise harsh." There is no authority for these propositions in any court. It seems symptomatic of attempts to "put a gloss" on *Thurston* (and the statute) that the proposed formulations are almost as numerous as the courts and parties who have attempted them.

is acting on an ad hoc, case by case basis without a governing definition of "willfulness." *Herold* v. *Hajoca Corp.*, 864 F.2d 317, 323 (4th Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989) (stating that the *Gilliam* court failed to offer an all inclusive definition of "willfulness"). *Gilliam* v. *Armtex, Inc.*, 820 F.2d 1387, 1390 (4th Cir. 1987).

The Eighth Circuit presents similar confusion. The Eighth Circuit has stated that it adheres to the "direct evidence" test, while at the same time holding that "an employer's concealment may provide evidence that the employer knew its conduct violated the ADEA." *Brown* v. *Stites Concrete Inc.*, 59 Fair Empl.Prac.Cas. (BNA) 614 (8th Cir. July 15, 1992) Nos. 91-2591, 91-3057 & 91-3139, 1992 WL 161417 (the court also specifically rejected the Third Circuit standard),[21] citing *Tolan* v. *Levi Strauss & Co.*, 867 F.2d 467, 471 (8th Cir. 1989). Previously, the Eighth Circuit had sometimes adhered to the *Thurston* standard without requiring "direct evidence." *MacDissi* v. *Valmont Industries, Inc.*, 856 F.2d 1054, 1061 (8th Cir. 1988); *Tolan* v. *Levi Strauss & Co.*, 867 F.2d 467, 470-471 (8th Cir. 1989); *Bethea* v. *Levi Strauss & Co.*, 827 F.2d 355, 359 (8th Cir. 1987) and see *Rademaker* v. *Nebraska*, 906 F.2d 1309, 1313 (8th Cir. 1990) (requires additional evidence beyond what is needed to prove the underlying case).[22]

At other times, the court has held that *Thurston* means "at least" that if there is "direct evidence" the "trier of fact may properly find willfulness." *Neufeld* v. *Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989); *Beshears* v. *Asbill*, 930 F.2d 1348, 1356 (8th Cir. 1991); and see *Morgan* v. *Arkansas Gazette*, 897 F.2d 945, 952 (8th Cir. 1990). It is difficult to

[21] Concealment was present in this case when, petitioner provided false information, under oath, to the state claiming Mr. Biggins had "voluntarily quit." (See *infra* Add. to Brf. A.1.) See *Benjamin* v. *United Merchants & Mfrs., Inc.*, 873 F.2d 41, 44-45 (2d Cir. 1989).

[22] This point seems self evident and is not an addition to *Thurston* in any sense, as *Thurston* obviously requires evidence of knowing or showing "reckless disregard, which is not needed to prove the underlying case.

conclude from these cases that the Eighth Circuit has adopted any consistent workable standard when it has sought to depart from *Thurston*.[23]

If a "direct evidence" test does exist, it is no more logical or supported by the statute than the outrageousness test. There is no recognized principle of statutory construction which allows the type of evidence used to prove the cause of action to define its meaning. Nor is there any reason why "direct evidence" should stand on any higher ground than any other admissible form of evidence. This Court has held that courts should not treat discrimination differently from other ultimate questions of fact by requiring direct evidence of discriminatory intent and that a plaintiff may prove his case by direct or indirect evidence. *U.S. Postal Service Bd.* v. *Aikens*, 460 U.S. at 716-717.

What the "direct evidence," "predominant factor," "outrageousness" and "egregious" tests do have in common is their failure to give the reviewing court a workable standard beyond a subjective analysis of the nature and quantum of the evidence.

E. *Petitioners' Actions Were Willful Violations of the Law.*

In the present case, the plaintiff's evidence clearly satisfies any of the present circuit court standards as well as the *Thurston* standard utilized by the First Circuit.

In an attempt to bring this Court into a review of the evidentiary record in this case, petitioners argue that there was no "probative" evidence warranting the award of liquidated damages, (Pet. Brf. 47), and they further argue that even the application of *Thurston* would not justify the imposition of

[23] Petitioners argue that the district court acted properly in reversing the jury's willfulness finding (Pet. Brf. 35) but do not propose the district court's rationale which is based on *Neufeld*.

liquidated damages (Pet. Brf. 49).[24] The former argument is based on the petitioners' own factual conclusion that Hazen was justified in its treatment of Mr. Biggins, because "Biggins was marketing the services of another company to Hazen Paper competitors." (Pet. Brf. 47). The jury, charged under the standards of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), reached the very different conclusion, that this justification was a pretext for the age discrimination suffered by Mr. Biggins. There was considerable evidence to justify this conclusion: the businesses in question were operated by and for the benefit of Mr. Biggins' son, who did all the work (J.A. 84, 123-127), one of the businesses had been defunct for two years (J.A. 79), and Mr. Biggins had previously disclosed the businesses to Thomas Hazen. (J.A. 80).[25]

The evidence demonstrated a calculated and deliberate effort on the part of the petitioners to treat Mr. Biggins differently from younger employees and to use his age (and the significance of his benefits and pension status to someone of his age) as a negotiating weapon and, ultimately, the vehicle for his termination and replacement by a younger employee. In order to conceal their behavior, the petitioners then used false and perjured information to try to deny Mr. Biggins his unemployment compensation. (See *infra* Add. to Brf. A-1.)

This kind of deliberate action, flaunting not only the ADEA, but the prohibitions of ERISA and the state's unemployment procedures (while also engaging in fraud) demonstrates a deliberate, intentional scheme to avoid the dictates of the law,

[24] This Court has indicated that, where the proper standard is applied, its role is not to weigh evidence to determine willfulness. *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. at 135 n.14.

[25] Petitioners' suggestion that Mr. Biggins and the Hazens simply had a dispute about compensation ignores the fact that the jury found that the stock compensation had already been promised Mr. Biggins, and that the Hazens were guilty of fraud after not providing it.

to damage Mr. Biggins because of his age, and subsequently to conceal those actions.

This evidence of willfulness would be satisfactory under any of the various circuits' standards now at issue. Indeed every court which has addressed the subject has concluded that termination of an employee just prior to his pension vesting constitutes outrageousness. *Dreyer* v. *Arco Chemical Co., Div. of Atlantic Richfield Co.*, 801 F.2d at 658; *Hansard* v. *Pepsi-Cola Metro. Bottling Co., Inc.*, 865 F.2d at 1466; *Uffelman* v. *Lone Star Steel Co.*, 863 F.2d at 410 n.5.

Clearly, too, age was the predominant factor in Mr. Biggins' dismissal. The Circuit Court found that age was "inextricably intertwined with the decision to fire Biggins." (Cert. Pet. A-14.) Given that the justification for the Hazens' action was found to be pretextual, no other reason exists for their actions, except reasons of age. Therefore, even the tests of the Sixth and Tenth Circuits are satisfied. See *Schrand* v. *Federal Pac. Elec. Co.*, 851 F.2d 152, 158 (6th Cir. 1988); *Cooper* v. *Asplundh Tree Expert Co.*, 836 F.2d. 1544, 1551 (10th Cir. 1988).

Petitioners lastly argue that even under an unmodified *Thurston* standard, willfulness could not have been found here because the alleged "pension as proxy" reasoning of the First Circuit could not have been divined by the Hazens. (Pet. Brf. 49). This argument is based on the completely false premise that the courts below found discrimination solely on the basis of interference with pension vesting which simply does not conform to the actual evidence and lower court opinions. (*See infra* pp. 33-36). This is not simply a matter of the relationship between Mr. Biggins' age and pension status, but of intentional disparate treatment ostensibly justified by purely pretextual reasons, followed by illegal attempts to conceal. In such circumstances, there was no need to divine anything about theories of age proxies. The petitioners assertion that "an

employer's good faith belief that his actions comply with the statute clearly precludes the imposition of liquidated damages" (Pet. Brf. 49) is as true as it is irrelevant, for the petitioners offered not one shred of evidence that they were acting under a good faith belief that they were complying with the law. The petitioners engaged in a deliberate and calculated scheme that extended to fraud and false statements under oath before the state unemployment division. (See *infra* Add. to Brf. A-1.) Their actions were neither innocent nor unsuspecting.

II. The District and Circuit Courts' Finding of Liability Under the ADEA Should be Affirmed.

A. *The Courts Below Did Not Improperly Equate Pension Interference With Age Discrimination.*

Petitioners initially sought review on the question of "whether an employer's interference with an employee's pension vesting, in a plan where benefits vest after ten years of service and are not based on age, violates the Age Discrimination in Employment Act." (Cert. Pet. p. i). In and of itself, that question cannot be directly addressed on the facts of this case because, aside from the evidence of pension interference, there was substantial other evidence of age discrimination. The plaintiff and respondent, Walter Biggins, was sixty-two years old at the time of his discharge. The respondent alleged, and the jury, the district court and the Circuit Court found age discrimination, based on several factors, only one of which was that his termination for pretextual reasons, at age sixty-two, occurred just prior to his pension vesting.

The evidence of age discrimination presented to the jury at trial centered on the circumstances surrounding Mr. Biggins' termination. The disparate treatment of Mr. Biggins included

the petitioners' attempt to force upon him a discriminatory confidentiality/patent agreement not required of similarly situated younger employees (J.A. 85-86), the fabrication of a pretextual reason (disloyalty) for his termination, the offer of a consulting role which deprived him of all employee benefits while still retaining his services, critical comments concerning his age, and his replacement by a thirty-five year old who received far more favorable treatment on the very same matters. Further, Thomas Hazen offered to negotiate with Mr. Biggins over his pension. These "offers," all stick and no carrot, suddenly were made to Mr. Biggins when he was on the verge of his pension vesting. (J.A. 111).[26]

Mr. Biggins was then terminated just prior to the time he would have vested and been eligible for benefits.[27] The pension interference was presented as evidence of a calculated scheme of age discrimination and not as a proxy for age discrimination in itself.[28]

Contrary to petitioners' assertions, each of the courts below, in affirming the jury's verdict, clearly demonstrated their reliance on the multiple acts of age discrimination engaged in

[26] The timing of events was a critical factual issue because the petitioners' asserted justification for their actions was their supposed "outrage" over Mr. Biggins' "disloyalty." One factor the jury certainly considered in rejecting petitioners' assertion of disloyalty and accepting Mr. Biggins' testimony that he had received permission from Thomas Hazen for his limited involvement with his son's business venture was that the Hazens were aware of these "facts" in April, yet waited six weeks, until the eve of Mr. Biggins' pension vesting, to convey their alleged "outrage." (J.A. 80, 148-151).

[27] As the United States correctly points out in its amici curiae brief, nothing in the judge's instruction could have led the jury to conclude that a termination to prevent the vesting of pension rights required a finding of an ADEA violation. (Brief for the United States 22 n.18). Conversely, petitioners did not request any jury instruction that a termination to prevent the vesting of a pension could not be evidence of age discrimination or that it could only be considered under ERISA, as they now argue.

[28] Mr. Biggins, once vested under the terms of the pension plan, would have been eligible for immediate benefits *because of his age* (over sixty). (J.A. 182).

by the petitioners, which were unrelated to pension interference. The district court went on at length in its opinion, reciting this evidence, and specifically stated that discharge "in order to eliminate the employee's pension rights cannot by itself establish age discrimination" but provides some proof of it. The district court concluded that "based on the evidence adduced at trial and reasonable inference drawn therefrom, the verdict as to age discrimination will stand." (Pet. App. A-57).

Petitioners assert that the Circuit Court made a "formulation that pension status is inextricably intertwined with age" (Haz. Brf. 28), and that the Circuit Court created a "per se rule equating pension status with age" as the "linchpin" of its decision. (Haz. Brf. 14). Petitioners are twisting the Circuit Court's words. What the Circuit Court actually stated was:

> The jury could also have reasonably found that *age* was inextricably intertwined with the *decision* to fire Biggins. (Pet. App. A-14) (emphasis supplied).

This conclusion by the Circuit Court followed a three-page review of all factors, including those unrelated to pension interference but which constituted evidence of age discrimination. Based upon these multiple factors, the Circuit Court concluded:

> Based on our review of the evidence[29] we find that it was within the province of the jury to decide whether age was a determining factor in the defendants' decision to terminate Biggins' employment. (Pet. App. A-14).

[29] This review included the critical comments about Mr. Biggins' age by the Hazens (Pet. App. A-12), the confidentiality agreement (Pet. App. A-13), the hiring of a younger successor (Pet. App. A-13), the disparate treatment of the younger successor (Pet. App. A-13), the absence of such an agreement for any other employee while Biggins was there (Pet. App. A-13), and the fact that Mr. Biggins was sixty-two years old and close to vesting (Pet. App. A-13), together with the offer of a consulting position with its consequent loss of benefits. (Pet. App. A-14).

Therefore, if pension interference as a "proxy" for age discrimination is the issue petitioners present, then this case is inappropriate for its resolution, because there was other independent evidence of age discrimination which the jury relied on, and because the issue was never raised in the courts below.

B. *Petitioners Raise Evidentiary Issues Not Raised or Preserved Below.*

In their brief, the petitioners alter the question presented to now state: "[W]hether the Courts below erred in sustaining respondent's claim . . . where the finding of age discrimination was based upon the logically irrelevant issue of pension vesting, and not upon considerations of age?" (Haz. Brf. i). This question still includes the misconception that the lower courts were not relying on evidence of age discrimination, separate from interference with pension status. The petitioners now argue that interference with pension vesting (and indeed any matter relating to discrimination on the basis of seniority or other benefits) cannot be considered evidence of age discrimination.

If the issue petitioners wish to present is whether interference with pension vesting can *ever* be considered as evidence of age discrimination, that issue was not raised and was not properly preserved below. Petitioners never objected to the introduction of this evidence at trial on the ADEA claim and never requested any limiting jury instruction that the evidence should not be considered on the ADEA claim.[9] Furthermore, petitioners have never argued at *any* stage of the proceedings, including in their motions for directed verdict and judgment not-

[9] While this evidence was certainly relevant to Mr. Biggins' ERISA claim, petitioners never objected to its introduction with respect to the ADEA count or asked for any instruction distinguishing the evidence between the two counts. Nor did they ever request a bench trial on the ERISA claim in order to separate the issue from jury consideration.

withstanding the verdict, and in their appeal to the Circuit Court, that evidence of interference with pension vesting could not be evidence of age discrimination under the ADEA. (J.A. 188-192). This failure renders the question inappropriate for review. See *City of Springfield, Mass.* v. *Kibbe*, 480 U.S. 257, 258-259 (1987); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38-39 (1989).

C. *Interference With Pension Vesting is Permissible Evidence of a Violation of the ADEA.*

Even if the failure to raise this issue below did not make the matter inappropriate for review now, petitioners' assertion that interference with pension vesting cannot constitute evidence of age discrimination is clearly wrong and contrary to the overwhelming weight of authority. Every circuit court which has considered the question has ruled that evidence regarding the timing of the vesting of pension benefits can be evidence of age discrimination in a termination. *White* v. *Westinghouse Elec. Co.*, 862 F.2d 56, 62 (3rd Cir. 1988) (discharge motivated by desire to avoid increased benefits payable after thirty years of service violates the ADEA); *Hansard* v. *Pepsi-Cola Metro. Bottling Co., Inc.*, 865 F.2d 1461, 1466 (5th Cir. 1989), *cert. denied*, 493 U.S. 842 (1989) ("Hansard's termination only seven months before his pension benefits were to vest also supports his claim of age discrimination"); *Castleman* v. *Acme Boot Co.*, 959 F.2d 1417, 1421 (7th Cir. 1992) ("[T]he evidence of timing in relation to vesting of pension benefits can be evidence of age discrimination.")[9] See also *Benjamin*

[9] Petitioners cite *Wheeldon* v. *Monon Corp.*, 946 F.2d 533 (7th Cir. 1991) as rejecting a correlation between pension status and age while conceding it held that pension may be used as a proxy for age. (Pet. Brf. 29). *Wheeldon* involved the employee's military pension and not the employer's own pension plan.

v. *United Merchants & Mfrs., Inc.*, 873 F.2d 41 (2nd Cir. 1989) (determination of age discrimination was supported by evidence that employee who had vested in pension plan had been replaced by younger employee not vested in plan); *Dreyer* v. *Arco Chemical Co., Div. of Atlantic Richfield Co.*, 801 F.2d 651, 658 (3rd Cir. 1986), *cert. denied*, 480 U.S. 906 (1987) (termination of employee to prevent vesting of pension benefits would be sufficiently "outrageous" conduct to justify a finding of willfulness.)[12] *Burns* v. *Texas City Refining, Inc.*, 890 F.2d 747, 751-752 (5th Cir. 1989) (decision to replace employees because of their age done before one of the employee's pension vested supported jury's finding of willful violation of the ADEA). Cf. *Finnegan* v. *Trans World Airlines, Inc.*, 967 F.2d 1161, 1165 (7th Cir. 1992) (cutting vacations of older workers as a way of prodding them to take early retirement under early retirement plan designed to induce older workers to leave would be deliberate discrimination and clearly actionable).[13]

Nor does *Visser* v. *Packer Eng'g Assocs., Inc.*, 924 F.2d 655 (7th Cir. 1991) (en banc), support the petitioners' position, for there the court held only that knowledge of pension status alone could not prove age discrimination. *Visser* v. *Packer Eng'g Assocs., Inc.*, 924 F.2d at 658. See *Castleman* v. *Acme Boot Co.*, 959 F.2d at 1421 n.2.

Of course it is true in a theoretical sense that service-based pension status and age are not *necessarily* connected, and that an employee in his thirties could well be the victim of pension inference. However, this is not a theoretical case but a real one, that involves an individual who was sixty-two years old,

[12] Petitioners rely on *Dreyer* and *Hansard* in advancing their standards of outrageousness or egregiousness but ignore their statement that interference with pension vesting could constitute willful age discrimination.

[13] Some district courts have found termination prior to vesting to be sufficient in and of itself to prove age discrimination. *Bishop* v. *Jelleff Assocs.*, 398 F. Supp. 579, 589 (D.D.C. 1974); *Dean* v. *Allegheny Int'l*, 47 Fair Empl.Prac.Cas. (BNA) 1879 (N.D.Ill. 1988) No. 86 C 10187, 1988 WL 26872.

a fact well known to the petitioners.[14] Respondent has never argued that pension interference equals age discrimination in all situations or that its existence in this case was itself the only basis for a finding of age discrimination.

Petitioners' discussion of whether the ADEA governs decisions based solely on seniority, or pension status, is meaningless in the context of a situation such as here, where benefits and pension status were used as weapons against Mr. Biggins, because he was sixty-two years old and therefore perceived as being vulnerable to pressure concerning these points. An employee at sixty-two has greater interest in his benefit and pension status than does a younger employee. The older worker may be more likely to face illness or imminent retirement or may not be able to work sufficient time in another job to vest in a pension if he were terminated. On its face the ADEA prohibits discrimination in all aspects of the employment relationship, making it unlawful "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623 (a)(1). There is no exclusion for pensions in this prohibition. This evidence, therefore, was properly credited by the courts below.

D. *A Concurrent Violation of ERISA Does Not Prevent Recovery Under the ADEA.*

Petitioners argue that the availability of an ERISA remedy for interference with pension vesting "militates" against construing the ADEA to reach such conduct (Pet. Brf. 33).

[14] The Hazen pension plan permitted Mr. Biggins to draw on his pension fund anytime after he was sixty and his rights were vested. Therefore as Mr. Biggins was sixty-two he could have taken benefits immediately if he was terminated after his pension rights vested. As it was, the Hazens turned him out with nothing.

This remarkable proposition, notably absent from ERISA itself, or, for that matter, the ADEA, is not supported by any authority or compelled by the logic of the statute. Petitioners rely on *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 144 (1985), which was an ERISA case, on the availability of punitive damages under ERISA; and on *Northwest Airlines, Inc.* v. *Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 97 (1981), which only involved a question of remedies available under Title VII and The Equal Pay Act. This case does not present a question of what remedies are available but, even under petitioners' distorted presentation, concerns a question of substantive coverage of the ADEA.

This case does present the unremarkable proposition that, in some circumstances, an injured person may be able to avail himself of the protection of two federal laws intended to prevent unlawful discrimination in the workplace. Petitioners cite *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989). There the Court *approved* the concept that there could be overlapping coverage between §1981 and Title VII, while also holding that some conduct was not covered by both statutes, because, to reach the conclusion that all conduct was covered by both, the Court would have to adopt a "tortuous construction" of the statute beyond its plain meaning. *Patterson* v. *McLean Credit Union*, 491 U.S. at 181. No such tortuous construction is being attempted here, where the plaintiff presented the pension-related actions as evidence of age discrimination which the ADEA bans on its face.

There is nothing unusual about a result where discrimination under one statute is also discrimination under another. Congress has frequently passed overlapping statutes in the civil rights area. The Equal Pay Act prohibits discrimination in wages on the basis of sex, and the subsequent broader sex discrimination provisions of Title VII also prohibit this. See 29 U.S.C. § 206(d), 42 U.S.C. § 2000e-2(a)(1). Title VII prohibits national origin discrimination, and the subsequent Immigration Reform and Control Act prohibits the same discrimination. 42 U.S.C. § 2000e-2(a)(1), 8 U.S.C. § 1324(b).

E. *There Was Sufficient Evidence to Support a Finding That Respondent Was Dismissed In Order to Prevent His Pension From Vesting.*

Petitioners also attempt to present the additional and separate issue of whether the evidence itself was sufficient for the jury to find that Mr. Biggins was dismissed in order to prevent his pension rights from vesting.

This issue was not itself presented in the Petition for Certiorari, and it is presumably now presented on the incorrect assumption that the Circuit Court based its decision solely on evidence of interference with pension vesting.

In any event, the petitioners' attempt to present the evidence in a light most favorable to them is wholly without merit.

The assertion that the "only evidence" was Thomas Hazen's "arguable" knowledge of Mr. Biggins' pension status is simply false.[11] *Visser* v. *Packer Eng'g Assocs.*, 924 F.2d 655 (holding

[11] Petitioners claim that the district court noted, "Mr. Hazen appeared to be under the impression that Biggins had already achieved full vesting under the plan." (Pet. Brf. p. 25 n. 20). This is wrong on three counts. First, this is certainly and obviously not what the district court stated in its note 4 (Pet. App. A-63). The district court noted only that during the litigation, respondent had discovered a clause in the summary description of the plan which appeared to indicate that Mr. Biggins should have vested almost a year before his termination, even though the company had told him he was not vested. (Pet. App. A-63). At trial, Thomas Hazen did not claim that he believed this, rather he foreswore any knowledge of the provision. (J.A. 157-158). The district court cited Thomas Hazen's testimony in note 4 only because Hazen was asked on *cross examination* to *read* the provision in question. (J.A. 157, 158). To suggest now, as petitioners do, that it was Thomas Hazen's testimony that he believed Mr. Biggins was vested is plainly false. Finally, petitioners in all their pleadings specifically denied Mr. Biggins was entitled to any pension benefits and appealed his verdict on that issue to the Court of Appeals. Not an insignificant amount of time and money, one must assume, was spent fighting to deny Mr. Biggins a benefit that petitioners now suggest Mr. Hazen believed had already vested in Mr. Biggins.

that knowledge of pension status alone is insufficient), has no relevance here. Not only was Thomas Hazen aware of Mr. Biggins' pension status, he used it to his advantage, submitting a discriminatory confidentiality agreement to Mr. Biggins on the eve of his vesting. When Mr. Biggins agreed to sign the agreement, provided his compensation be included (J.A. 86-87), the Hazens took a different tack and suggested Mr. Biggins become a consultant. (J.A. 87). Contrary to petitioners' argument, the record is rich in evidence that such a status would have deprived Mr. Biggins of his pension. Under the pension plan, only employees could participate in the pension plan. (J.A. 161, 181-182). Hazen had several consultants in other areas, none of whom received any benefits or participated in the plan. (J.A. 160-161). The jury could have reasonably inferred that Thomas Hazen's statement about an agreement to "cover" Mr. Biggins' pension rights was a not so subtle reminder to Mr. Biggins of his precarious pension situation, and that the separation agreement would "cover" the subject by eliminating Mr. Biggins' pension. The evidence demonstrated calculated use of Mr. Biggins' age and pension status as weapons against him.

In truth, petitioners are simply seeking to obtain through the back door another review of the evidence in this case, the factual disputes of which were long ago decided by the jury. Two courts have patiently and thoroughly reviewed the evidence. There are no grounds to drag this Court through still another review.

Conclusion.

For all of the reasons outlined above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Date: September 4, 1992

Addendum.

PLAINTIFF'S TRIAL EXHIBIT 18

JOB INSURANCE

REQUEST FOR SEPARATION AND WAGE INFORMATION - NEW CLAIM RETURN

COMPLETED FORM TO: Commonwealth of Massachusetts
Division of Employment Security
136 Worthington St, PO Box 640
Springfield MA 01101

Seq	Social Security No.	Date of Claim
001	030-12-8123	06-22-86
Filing Date	Mailing Date	Sex
06-25-86	06-26-86	M
	IP	Employer ID No.
05-29-25	Y	00-307130

CLAIMANT NAME AND ADDRESS:
Walter F. Biggins
52 Redfern Dr.
Longmeadow, MA 01106

EMPLOYER NAME AND ADDRESS:
Hazen Paper Co.
Foot of Jackson Street
Holyoke, MA 01401

PART I

A. PERIOD LAST EMPLOYED: FROM _____ THROUGH _____

B. SEPARATION REASON:
Lack of Work ☐
Voluntary Quit ☒
Discharge ☐
Labor Dispute ☐
Other ☐

C. SEPARATION IS:
Permanent ☒
Partial ☐
Temporary ☐
Recall Date _____

EMPLOYER CERTIFICATION: These are true statements to the best of my knowledge and belief under the penalties of perjury.

Signature: s/ Rossmeisl — Title: Controller

Dated: June 30, 1986 — Tel: (413) 538-8204

D. GROSS WAGES PAID DURING 52 WEEK BASE PERIOD

Quartlerly Periods From	To	Gross Wages Paid	Date Started	Date Stopped
06/23/85	06/30/85	$ paid on monthly basis		
Qtr. Ending 09/30/85		$17,256.00	07/1/85	09/30/85
Qtr. Ending 12/31/85		$17,556.00	10/1/85	12/31/85
Qtr. Ending 03/31/86		$23,656.00	01/1/86	03/31/86
04/01/86	06/21/86	$19,336.00	04/1/86	06/21/86
TOTAL PAID		$77,804.00		